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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

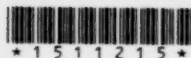
Written statement^{*} submitted by the Human Rights Advocates Inc., a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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^{*} This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Strengthening the Business and Human Rights Framework: Extraterritorial Obligations and Adoption of a Binding Treaty

I. Introduction

In 1948, the General Assembly adopted the Universal Declaration of Human Rights as a "common standard of achievement of all peoples and nations," which outlined the most basic civil, political, economic, social, and cultural rights that all humans have a right to enjoy. Although the achievement of human rights is theoretically a universal concern of all individuals and entities, international human rights law traditionally only creates duties upon *States* to protect human rights. However, the titanic reach of transnational corporations has raised questions as to (i) whether those duties extend beyond a State's borders and (ii) whether imposing duties upon States alone is sufficient to address the abundant violations caused by corporate conduct.¹

This statement proposes two suggestions for strengthening the current business and human rights framework: first, States should recognize the existence of extraterritorial obligations in order to mitigate protection gaps that frequently affect the world's most vulnerable groups; second, States should support the adoption of a binding treaty on transnational corporations, given that the current framework inadequately protects against human rights abuses caused by business activity.

II. Extraterritorial Obligations Under International Law

The International Covenant on Economic, Social and Cultural Rights sets forth in Article 11: "The States Parties...recognize the right of everyone to an adequate standard of living...including adequate food, clothing and housing, and to the continuous improvement of living conditions."² Additionally, the parties "recognize the right of everyone to...the highest attainable standard of physical and mental health."³ While the State obligation to undertake steps toward achieving progressive realization of economic, social and cultural rights is clear,⁴ questions have been raised as to whether that obligation applies extraterritorially.

The lack of clarification of whether States have a duty to protect beyond their borders has, in the past, caused concern about dangerous protection gaps. In response, the world's human rights experts drafted principles to guide States in their compliance with obligations outside of their jurisdiction.⁵ The result was the issuance of the Maastricht Principles on Extraterritorial Obligations, not as an establishment of new law, but as a clarification of standing human rights principles.⁶ Principle 23 declares, "All States must take action...to protect economic, social and cultural rights of persons within their territories and extraterritorially..."⁷ Moreover, Principle 24 requires States to "take necessary measures to ensure that non-State actors which they are in a position to regulate,...such as...transnational corporations,...do not nullify or impair the enjoyment of economic, social and cultural rights. These include

¹ See UN Guiding Principles on Business and Human Rights, Annex to A/HRC/17/31 (2011), section II ("II. The corporate responsibility to respect human rights"), paras 11-24.

² International Covenant on Economic, Social and Cultural Rights, article 11(1), 993 U.N.T.C. 3 (16 December 1966).

³ *Id.* at article 12(1).

⁴ *Id.* at article 2(1).

⁵ ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, p. 3 (2013).

⁶ *Id.* at p. 3.

⁷ Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, Section IV, Principle 23 (28 September 2011).

administrative, legislative, investigative, adjudicatory and other measures.”⁸ State recognition of the Maastricht Principles is a prerequisite to furthering adequate regulation of global business enterprises. Moreover, the vital role of extraterritorial obligations in shaping the corporate accountability framework cannot be ignored.

III. Adoption of a Binding Treaty on Transnational Corporations

The rise in global scrutiny of corporate conduct has led to various proposals for an adequate regulatory framework.⁹ The Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council (HRC) in 2011,¹⁰ is widely considered the most authoritative UN source in this arena.¹¹ They embody a “Protect, Respect, and Remedy” model, dictating that: 1) States have a responsibility to *protect* human rights; 2) business enterprises are required to *respect* human rights; and 3) rights must be matched by appropriate *remedies* when breached.¹²

Several international legal sources demonstrate that the Principles fall behind the current state of international law on extraterritorial duties;¹³ namely, the State duty to regulate corporations subject to their control.¹⁴ For example, Principle 2 provides that “States should set...the expectation that all [businesses] domiciled in their...jurisdiction respect human rights throughout their operations.”¹⁵ However, the Principle is dangerously qualified by the following:

...States are not generally required under international...law to regulate the extraterritorial activities of businesses domiciled in their...jurisdiction. Nor are they generally prohibited from doing so, provided there is a...jurisdictional basis. Within these parameters some...treaty bodies recommend that...States...prevent abuse abroad by [businesses] within their jurisdiction.¹⁶

In 2014, the HRC adopted a resolution sponsored by Ecuador and South Africa which established a working group mandated to “elaborate an international legally binding instrument to regulate...the activities of transnational

⁸ Id. at Section IV, Principle 24.

⁹ Paula Gerber et. al., *General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect?*, 14 Melb. J. Int'l L. 93 (2013).

¹⁰ Human Rights Council, Resolution on “Human rights and transnational corporations and other business enterprises,” A/HRC/17/31 (2011).

¹¹ Olivier De Schutter, *Regulating Transnational Corporations: A Duty under International Human Rights Law*, Contribution of the Special Rapporteur on the Right to Food during the 25th Session of Human Rights Council, p. 1, available at <http://www.ohchr.org/Documents/Issues/Food/EcuadorMtgBusinessAndHR.pdf> (March 2014).

¹² Guiding Principles on Business and Human Rights, *supra* note 1, at p. 6.

¹³ See *Regulating Transnational Corporations*, *supra* note 11 at p. 4; see also The Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health*, E/C.12/2000/4 at para. 39 (2000) and The Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada, CERD/C/CAN/CO/18 at para. 17 (2007).

¹⁴ Id. at p. 5. Moreover, it is noteworthy that in 2003, the UN Sub-Commission on the Promotion and Protection of human rights adopted Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights Norms, which provided a comprehensive approach to corporate accountability through binding legal obligations and periodic UN monitoring of corporate efforts to investigate human rights violations. However, the failure the UN Commission on Human Rights to ultimately adopt the Norms contributed to a dangerous roll-back on the progression of corporate accountability. See Connie de la Vega, Amol Mehra, & Alexandra Wong, *Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps* at p. 3, available at <http://library.fes.de/pdf-files/iez/08264.pdf> (July 2011).

¹⁵ See Guiding Principles on Business and Human Rights, *supra* note 1.

¹⁶ See Guiding Principles on Business and Human Rights at Commentary to Principle 2, *supra* note 1.

corporations and other business enterprises."¹⁷ The proposal has been embraced by some as a bold effort to strengthen the soft law framework, while others have vowed never to support its inception.¹⁸

An illustrative example of the need for a binding instrument is the Minas Conga mining project in Peru, where expansion of a massive gold and copper mining operation has led to numerous violations since it began in 2011, including the communities' right to free, prior informed consent and to an adequate standard of living.¹⁹

Notwithstanding these and other violations, the Guiding Principles have failed to compel the Peruvian government to intervene on the side of human rights promotion.²⁰ Moreover, although host and home states are responsible for ensuring access to remedy under the Guiding Principles, victims' mistrust of domestic courts, as well as the history of U.S. dismissal of criminal and civil actions against corporate actors operating abroad, make the likelihood of success untenable.²¹

IV. Human Rights Advocates Recommendations

- a. HRA urges the Human Rights Council to:
 - i. Recognize the Maastricht Principles on Extraterritorial Obligations as a valuable tool for shaping transnational corporate accountability, and
 - ii. Support the working group's efforts to elaborate a binding treaty with a view toward strengthening transnational corporate accountability in relation to human rights protection worldwide, and urge the working group to include an accountability mechanism.

¹⁷ Human Rights Council, Resolution on *Elaboration on an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/22.L/Rev. 1 at para. 1 (25 June 2014).

¹⁸ Shane Darcy, *Academic comments on current key issues in debate over binding treaty on business & human rights*, available at <http://business-humanrights.org/en/academic-comments-on-current-key-issues-in-debate-over-binding-treaty-on-business-human-rights> (15 April 2015).

¹⁹ Cindy S. Woods, "It Isn't a State Problem": *The Minas Conga Mine Controversy and The Need For Binding International Obligations on Corporate Actors*, 46 *Geo J. Int'l L.* 629, 664 (Winter 2015).

²⁰ *Id.* at p. 667-78.

²¹ *Id.* at p. 671. Newmont, the mining company that owns and operates the project, is a U.S.-based company.